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IN THE

# SUPREME COURT

OF THE

UNITED STATES

**OCTOBER TERM, 1982**

ALOHA AIRLINES, INC.,

*Appellant,*

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

*Appellee.*

HAWAIIAN AIRLINES, INC.,

*Appellant,*

v.

DIRECTOR OF TAXATION OF THE STATE OF HAWAII,

*Appellee.*

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII**

## BRIEF OF STATES OF ALASKA, ARIZONA, OKLAHOMA, WASHINGTON, AND WEST VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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## QUESTION PRESENTED

**Whether in the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, Congress intended to preempt longstanding state business taxes applicable to a wide range of businesses, including airlines, merely because they were measured by gross receipts.**

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## STATEMENT OF INTEREST OF *AMICI*

The States of Alaska, Arizona, Oklahoma, Washington, and West Virginia have longstanding general business taxes measured by gross receipts applicable to a wide range of businesses, including airlines, which do business within the respective states.[1] In their briefs, the appellant airlines and the United States as *amicus curiae* have designated these and other generally applicable business taxes in a number of states including the *amici* states (hereinafter referred to as the "designated states") as the type of taxes on gross receipts which Congress intended to preempt under the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513 (hereinafter referred to as "§ 1513").[2] The *amici* states contest this position.[3]

The *amici* states have an interest which goes beyond a financial one. In the Brief for the United States as amicus curiae in Support of Appellants (U.S. Br.) the United States urges a standard for preemption of generally applicable state laws based on an imprecise articulation of federal policy in statutes dealing with aviation generally

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[1]These taxes are described in some detail in Section II of the Argument.

[2]See Brief Amicus Curiae of United States (in Support of Jurisdictional Statement) (U.S. Br.) at 11, nn. 15-16; Brief of Appellant Hawaii Airlines, Inc. (Hawaiian Br.) at 26, nn. 29-30; Brief for Appellant Aloha Airlines, Inc. (Aloha Br.) at 13-14. Jurs. St. of Aloha Airlines at 16. The appellants and United States have designated eleven states as having now or in the recent past taxes preempted under § 1513(a): Alaska, Arizona, Delaware, Hawaii, Indiana, Maryland, Mississippi, New York, Oklahoma, Washington, and West Virginia. These states will be referred to in this brief as the "designated states."

[3]This also is the position of the Air Transport Association and various airlines in other related litigation in state courts and administrative tribunals. *See State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1981); *Air Transport Assoc. of America v. New York Dept. of Taxation and Finance*, 458 N.Y.S.2d 709 (App. Div. 3d 1983); *Wien Air Alaska v. Alaska Dept. of Revenue*, No. 3AN 81-8382 (Alaska Sup. Ct., 3d Jud. Dist., filed Dec. 10, 1981); *Alaska Aeronautical Industries, Inc. v. Alaska Dept. of Revenue*, No. 3AN 81-4286 (Alaska Sup. Ct., 3d Jud. Dist., filed June 22, 1981); *Republic Airlines v. Washington Dept. of Revenue*, No. 82-2-01723-7 (Thurston Co., Wash. Sup. Ct., filed Dec. 30, 1982); *Northwest Airlines v. Washington Dept. of Revenue*, No. 82-24 (Wash. Bd. of Tax Appeals, filed May 28, 1982).

and by imprecise preemptive language in § 1513. We have concern that adoption of such a standard would not only contradict many of this Court's decisions on preemption, *e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449 (April 20, 1983), but relegate to federal courts the primary role of determining which state laws are superseded by federal law, a function which more properly lies with Congress.

## SUMMARY OF ARGUMENT

1. The taxes of the *amici* states, the other designated states, and Hawaii, which have been at issue in this and related litigation, are non-discriminatory business taxes *measured by* gross receipts and applicable to a wide range of taxpayers, not just airlines. The incidence of such taxes is not "gross receipts" but some aspect of doing business.[4]

2. In enacting § 1513, Congress did not intend to preempt generally applicable, non-discriminatory business taxes measured by gross receipts. This is because:

a. The general business taxes of the *amici*, the other designated states and Hawaii run counter to no federal policies. They are consistent with longstanding congressional policy not to interfere with the general business taxes of the states except in narrow, specifically articulated situations and only after careful study of the impacts of federal preemption.

b. Though the "plain language" of § 1513 actually is ambiguous, it nevertheless indicates that its preemptive effect is limited in scope.

c. the legislative history of § 1513 indicates that:

i. Its preemptive impact was limited in principal part to user taxes, including head taxes, similar in incidence or effect to the user taxes imposed by the Airport and Airway Revenue Act of 1970, 84 Stat. 236.

ii. To the extent that any preemptive effect of § 1513 extends beyond state user taxes,

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[4]*But see* Ind. Code Ann. §§ 6-2.1-2-1 to 6-2.1-2-4 (Burns 1982 Supp.) (tax on receipt of gross income).

including "head taxes," it extends only to discriminatory taxes which are in effect substitutes for such user taxes and which are imposed discriminatorily against airlines and not against a wide range of other businesses.

## ARGUMENT

### I. Introduction.

In its brief the United States argues that the challenged Hawaii tax and other state taxes based "on annual airline gross receipts" unless overturned "will progressively undermine the federal fiscal structure for the funding of civil aviation facilities." U.S. Br. at 10. The United States cites the current statutory compilations of the statutes of the *amici* and other designated states, eleven in total including Hawaii, implying that these taxes are "progressively" being enacted to circumvent the Congressional purpose to prohibit taxes on gross receipts. Further, Hawaiian Airlines implies that the *amici* and other states are examples of states "wishing to evade the prohibition contained in 49 U.S.C. § 1513." Brief for Appellant Hawaiian Airlines, Inc. (Hawaii Br.) at 26.

Despite the implications to the contrary, the taxes of the *amici* states are not examples of states wishing to evade a Congressional preemption. They are generally applicable business taxes measured by gross receipts, as the next section shows. All the taxes, except one, were in existence in 1970, and there is no Congressional intent to preempt any of them.

### II. The Taxes of the Amici and Other States Are Longstanding, Business Taxes Applicable to a Wide Range of Taxpayers, Not Just Airlines.

#### A. Alaska.

Alaska imposes its business license "fee", the incidence of which is on "the privilege of engaging in a business in the state." Alaska Stat. § 43.70.020(a) (1982 Supp.). Between 1949 and 1979 it was applicable to all

businesses doing business in Alaska and was measured by a formula which included a percentage of the gross receipts of the business.[5] Though in 1978, the law was amended to remove that part of the "fee" calculated by use of gross receipts, there is ongoing litigation between Alaska and some airlines for pre-1979 tax liability.[6] For tax years prior to 1977, no major airline contended this tax was preempted under § 1513.

### B. Arizona.

Arizona imposes its "transaction privilege tax" measured by gross receipts upon a wide range of businesses in the state. Ariz. Rev. Stat. Ann. §§42-1309, *et seq.* The incidence of this tax is "upon the privilege or right to engage in business in the State, although measured by the gross income of business activity conducted within the State." *Tower Plaza Investments, Ltd. v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973), *appeal dismissed*, 414 U.S. 1118 (1974).

The tax was first enacted in 1935, though airlines transportation was not formally listed in the classification with other carriers, utilities, contractors, mining and timber companies, and others until 1954.[7] Though the application of this tax to intrastate operations of airlines has been declared unconstitutional,[8] prior to that litigation, Arizona collected from the airlines taxes imposed by this chapter until 1975.

### C. Delaware.

Delaware's tax is the only one of the eleven not in

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[5]See Chapter 43, 1949 Alaska Sess. Laws 132. Prior to 1978, the "fee" generally included a fixed sum plus .5% of the gross receipts of the business in excess of $20,000. However for "gross volume" in excess of $10,000, the rate was .25%. See Alaska Stat. § 43.70.030 (1977).

[6]See note 3, *supra*. In Alaska five other appeals by air carriers have been stayed at the administrative hearing level pending the outcome of current litigation.

[7]Chapter 77, 1935 Ariz. Sess. Laws 310; chapter 136, 1954 Ariz. Sess. Laws 252.

[8]*State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1981).

existence prior to 1973. Imposed in 1975,[9] it resembles the Alaska tax described above in that it is license tax upon persons engaging in business measured in part by a flat fee and in part by a percentage of the gross receipts of the business. Del. Code Ann. Tit. 30 §2301. To date, there has been no challenge to this tax by any airline.

D. **Hawaii.**

Hawaii's tax, challenged in this action is described in the brief of the appellee. Like other taxes designated by the United States, it is a longstanding tax of general applicability, though one on property rather than on the act or privilege of engaging in business as are the taxes of the other designated states.

E. **Indiana.**

Indiana imposes its "gross income tax" on all businesses in Indiana, including airlines. Ind. Code Ann. §§ 6-2.1-2-1 to 6-2.1-2-4 (Burns 1982). This tax was first imposed in 1933 as a tax on gross income, chapter 50, 1933 Ind. Acts 388, and was amended in 1937 to become a tax "upon the receipt of gross income." Chapter 117, 1937 Ind. Act. 611. To date no airline operating within Indiana has challenged its imposition.

F. **Maryland.**

Since 1920 Maryland has imposed a "franchise tax" measured by gross receipts on all utilities and transportation companies. Md. Ann. Code Art. 81, § 130; chapter 226, 1929 Md. Laws 621; *see Cumberland & P.R. Co. v. State*, 92 Md. 668, 48 A.2d 503, 507 (1901) (tax is franchise tax). No airline has challenged the imposition of this tax in Maryland.

G. **Mississippi.**

Mississippi imposes its general business privilege tax "for the privilege of engaging or continuing in business or doing business within [the] state." Miss. Code Ann. § 27-65-13 (1972). *See generally Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). This tax has been in effect since 1932, chapters 90, 91, 1932 Miss. Laws 176, 196, and

[9]Chapter 24, 60 Del. Laws (Pt. 1) 45 (1975).

airlines were specifically included in the utilities section in 1955. Chapter 109, § 10, 1955 Miss. Laws (ex. sess.) 229. Though the statute was amended in 1978 changing its effects on airlines, chapter 490, 1978 Miss. Laws 933, there still could be pre-1978 tax liability.

H. **New York.**

Like Maryland, New York imposes a franchise tax measured by gross income on transportation companies and utilities. N.Y. Tax Law § 184 (McKinney Supp. 1982). It has been in effect since 1896. Chapter 908, 1896 N.Y. Laws. The ATA has challenged this tax relying on § 1513.[10]

I. **Oklahoma.**

Though the United States did not designate Oklahoma's tax as suspect, Hawaiian Airlines did. Hawaiian Br. at 26, n. 30. Oklahoma has since 1935 imposed its general sales tax on all sales, including sales of transportation services. Okla. Stat. Ann., tit. 68, § 1354(c) (West 1982 Supp.); Chapter 66, 1935 Okla. Sess. Laws 308. Transportation by airlines has been included within the scope of the tax at least since 1963. Chapter 367, 1963 Okla. Sess. Laws 680. No airline has contested the application of this tax under § 1513.

J. **Washington.**

Washington imposes a tax "for the act or privilege of engaging within this state" in various businesses, including railroad, telephone, telegraph, gas distribution, urban transportation, sea transportation, motor transportation, and "all public service businesses." RCW 82.16.020. The term "public service business" includes " airplane transportation." RCW 82.16.010(11). Though termed a "public utility tax," it taxes many businesses which are not subject to regulation by the state utilities and transportation commission. Nevertheless, it has been characterized by the Washington Supreme Court as a "franchise tax." *Public Utility Dist. No. 3 v. State*, 71 Wn.2d 211, 212, 427 P.2d 713, 714 (1962).

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[10]See note 3, *supra*. The State of New York is filing a brief amicus curiae in this case, focusing on the nature of its tax as a franchise tax and the expressed intent in § 1513 not to preempt such taxes.

The incidence of this tax is on the privilege of engaging in business in Washington. It is a tax measured by, though not imposed on, gross receipts. RCW 82.16.020. Though the statute imposes varying rates on the various types of businesses, the rate applicable to airline companies is among the lowest.

Currently, two airlines, Republic and Northwest, are litigating the preemptive effect of § 1513 on this tax. On May 10, 1983, the Washington State Board of Tax Appeals upheld the state's tax against a claim by Northwest that the tax was preempted. See note 3, *supra*. Northwest has foregone its right to a refund of taxes paid prior to 1977; Republic has foregone its rights for years prior to 1978.

K. **West Virgina.**

West Virginia imposes a tax on all carriers measured by net income, for those conducting interstate business, and by gross income, for those conducting intrastate business. W. Va. Code § 11-12A-2 to -3 (1982 Supp.). It has been imposed since 1933, chapter 33, 1933 W. Va. Acts. 219, and was specifically made applicable to airlines in 1959. Chapter 165, 1959 W. Va. Acts 534. To date, no airline has challenged the imposition of this tax.

L. **Summary.**

The taxes described above are not "progressively" being enacted to "undermine" the federal airport program as suggested by the United States. U.S. Br. at 10. Airlines are not singled out for special or discriminatory treatment. These are not the types of taxes Congress intended to preempt in § 1513.

## III. In Enacting § 1513, Congress Did Not Intend to Preempt Generally Applicable, Non-Discriminatory Business Taxes Measured by Gross Receipts.

The history of § 1513 spans a number of Congresses. Each house of Congress passed S. 3755, 92d Cong., 2d sess. in 1972, which for all relevant purposes was identical to § 1513.[11] However, for fiscal reasons, S. 3755 was pocket

[11]The only difference is that S. 3755 grandfathered in any existing

vetoed by the President.[12]

Versions of the vetoed bill were introduced in early 1973[13] and legislation was enacted promptly thereafter.[14] The relevant legislative history includes hearings,[15] committee reports,[16] and floor debates[17] from two sessions of Congress as well as prior versions of the bills and the general history and purpose of the federal airway

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tax "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts therefrom" in effect prior to May 21, 1970, until July 1, 1973. The final § 1513 extended the life of such preempted taxes to December 31, 1973.

[12]*See* 118 Cong. Rec. 37203.

[13]Bills introduced included: S. 38, H.R. 6388, H.R. 4082, H.R. 4214, H.R. 4265, H.R. 4182, H.R. 627, H.R. 1784, 93d Cong., 1st sess.; *see also* H.R. 4213, 93d Cong., 1st sess. (providing for moratorium on imposition of various state taxes).

[14]119 Cong. Rec. 18047 (June 5, 1973) (Senate); *id.* 17344 (May 3, 1973) (House).

[15]In the 92d Congress, both the Senate and the House held hearings specifically on the issue of state taxation. *Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and identical bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. (1972) (*1972 House Hearings*); *Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3302, S. 3611, S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972) (*1972 Senate Hearings*).

In the 93d Congress, only the House held hearings. *Airport Acceleration Development Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 (and all similar bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st sess. (1973) (*1973 House Hearings*). The Senate Commerce Committee stated that additional hearings were unnecessary. S. Rep. No. 12, 93d Cong., 1st sess. 6 (1973).

[16]H.R. Rep. No. 1543, 92d Cong., 2d sess. (1972) (1972 Conference Report); S. Rep. No. 1005, 92d Cong., 2d sess. (1972) (1972 Senate Report); H.R. Rep. No. 1279, 92d Cong., 2d sess. (1972) (1972 House Report); H.R. Rep. No. 225, 93d Cong., 1st sess. (1973) (1973 Conference Report); S. Rep. No. 12, 93d Cong., 1st sess. (1973) (1973 Senate Report); H.R. Rep. No. 157, 93d Cong., 1st sess. (1973) (1973 House Report).

[17]118 Cong. Rec. 27812-29 (Aug. 10, 1972) (1972 Senate debate on S. 3755); *id.* 29152-56 (Aug. 18, 1972) (1972 House debate on H.R. 14847); *id.* 30116-17 (Sept. 11, 1972) (Senate disagreement to House amendments); *id.* 35116 (Oct. 11, 1972) (House agreement to 1972

program.[18] Appellants have painted an incomplete picture of the Congressional process in enacting § 1513. Congress did not intend to preempt generally applicable business taxes of the type described in section I above. Congress may have the power to so preempt these taxes under appropriate conditions.[19] It has not demonstrated the requisite intent here.

Before turning to the language of the statute and its legislative history, we examine the federal policies which the United States, the ATA, and the airlines claim are violated by allowing the generally applicable business taxes of Hawaii and the designated states to stand. Not only are the policy arguments made by the United States and others unfounded, but the continued vitality of the taxes described above is completely consistent with applicable federal policy.

### A. The Continued Vitality of the Generally Applicable Business Taxes of Hawaii and of the Designated States Is Consistent With Federal Policies.

The United States argues that the Hawaii tax and the taxes of the designated states will "frustrate" federal interests that are expressed through various federal statutes which promote the development of civil aeronautics. U.S. Br. at 11-12. See also Brief of Appellant Aloha Airlines, Inc. on the Merits (Aloha Br.) at 23, which adopts the United States' discussion of that policy.

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Conference Report); *id.* 35860-62 (Senate agreement to 1972 Conference Report); 119 Cong. Rec. 3196-97 (Feb. 2, 1973), 3348-61 (Feb. 5, 1973) (Senate debate on S. 38); *id.* 13896-911 (May 2, 1973) (House debate on H.R. 6388); *id.* 14662-63 (May 8, 1973) (Senate disagreement to House amendments); *id.* 17344-45 (May 30, 1973) (House agreement to 1973 Conference Report); *id.* 18045-47 (June 5, 1973) (Senate agreement to 1973 Conference Report).

[18] *See generally Massachusetts v. United States*, 435 U.S. 444 (1978).

[19] We do not here address the argument made by the appellee that any attempted preemption would exceed the power of Congress under the commerce power, as limited by the Tenth Amendment of the Constitution. *See Hodel v. Indiana*, 452 U.S. 314 (1981); *National League of Cities v. Usery*, 426 U.S. 833 (1976). We incorporate the arguments made by appellee on this issue.

This federal policy argument of the United States is not sound for three reasons. First, a federal policy to "promote" an enterprise such as aviation does not result in a preemption of any generally applicable burdens including tax burdens placed on that enterprise by the states. Second, there are conflicting and controlling policies of federalism which require Congress to state clearly its intent before a preemption of state tax laws will be found. Third, Congress historically has proceeded with extreme caution before acting to preempt state tax laws.

### 1. Federal Policy to Promote Aeronautics Does Not Result in Preemption of Generally Applicable Tax Laws.

The United States cites simply to federal policies to encourage, promote, and foster civil aeronautics and air commerce. Even assuming that such a policy is a strong one, its existence is not determinative of preemption. Such policies are not indicative of an intent to preempt state laws unless Congress "has unmistakenly so ordained." *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981), *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

The principle is also illustrated in this Court's opinion in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449, 4457 (April 20, 1983), where the United States argued that the federal policy to promote the development of nuclear energy preempted a California statute requiring a moratorium on new nuclear power plants until a solution to the waste disposal problem had been found. Clearly, the California moratorium limited the growth of nuclear power or nuclear energy in California. However, the Court examined the specific intent of Congress as expressed in statutes and their legislative history to determine if there existed the requisite Congressional intent to preempt state laws. There, like here, Congress had not "unmistakenly so ordained" preemption.

### 2. Considerations of Federalism Require Congress to State Its Intent to Preempt State Tax Laws Clearly and Expressly.

Because the power to levy generally applicable business taxes is within "the historic police powers of the state," any preemption must be "a clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is particularly true in matters, such as this, where federal preemption would upset historic federal-state relationships. As stated in *United States v. Bass*, 404 U.S. 336, 349 (1971):

> In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

This Court has found preemption of state tax laws only where Congress has spoken specifically regarding its intent to so preempt. For example in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), this Court invalidated a New Mexico tax only after finding that Congress expressly had singled out that tax as the type of tax sought to be preempted. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Sullivan v. United States*, 395 U.S. 169, 178 (1969) (state sales and use taxes not preempted where Congress did not specifically so intend).

### 3. Historically, Congress Has Proceeded With Extreme Caution in Preempting State Tax Laws.

Congress historically has recognized the high degree of specificity it must employ in preempting state tax laws, conforming the scope of preemption with the specific problem which gave rise to its need.

In Public Law 86-272, 73 Stat. 555, 15 U.S.C. §§ 381-84, Congress limited the authority of states to impose a net income tax on income derived from interstate commerce. This law was deemed necessary in response to a particular

Supreme Court decision, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and was enacted only after Congress understood the effects it would have on the states and the number of states affected.[20]

In the Securities Acts Amendments of 1975, § 21, 89 Stat. 95, 15 U.S.C. § 78bb(d), Congress restricted state taxation of the change in beneficial or record ownership of securities under certain instances. Again, the language of the preemption is very specific and enacted with a view to preserve traditional state taxing jurisdiction.[21]

In several recent statutes, Congress has preempted "discriminatory taxes" levied against particular industries operating in interstate commerce. Congress has acted to preempt such taxes against railroads,[22] motor carriers,[23] and certain electric utilities.[24] In each case, the preemptive language is very specific. Again, Congress refrained from treading upon areas of historical state authority. Indeed, regarding the preemption of state taxes on generation or transmission of electricity which discriminate against out-of-state producers or consumers, the Senate Committee stated:

> The committee believes that this is an example of discriminatory taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce.

S. Rep. No. 938, pt. I, 94th Cong., 2d sess. 437 (1976).

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[20]*See* S. Rep. No. 658, 86th Cong., 1st sess. pp. 3, 6-9 (1959) (reference to 35 states, the District of Columbia, and 8 cities).

[21]The Senate Report states: "This provision is designed to facilitate the development of a national system for handling securities transactions while at the same time preserving the state taxing powers over transactions with which the taxing state has a traditional jurisdictional basis for taxation. S. Rep. No. 75, 94th Cong., 1st sess. 60 (1975).

[22]Railroad Revitalization and Regulatory Reform Act of 1975, 90 Stat. 531, *now codified as* 49 U.S.C. § 11503 (prohibiting states from taxing railroad property more heavily than other industrial or commercial property).

[23]Motor Carrier Act of 1980, 94 Stat. 823, 49 U.S.C. §11503a.

[24]Tax Reform Act of 1976, §2121(a), 90 Stat. 521, 15 U.S.C. §391. *See Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

In sum, Congress has acted in selected cases in the past to preempt a state's power of taxation. But in each such case Congress acted carefully and with an understanding of the historic and appropriate role of states in levying general business taxes on industries operating in interstate commerce. When compared to these other examples of Congressional preemption, the interpretation given to § 1513 by the United States, the ATA, and the airlines is strained. They seek to have this Court attribute to Congress an intent to accomplish broadly what it historically has done narrowly and accomplish by inference what it has historically only done by express statement of intent.

We turn now to the language of the statute and its legislative history to show why appellants' position does not fit with what this Court has done in the past.

## B. Section 1513 Indicates That Congress Did Not Intend a Broad Preemption of State Tax Laws.

### 1. The "Plain Meaning" of Section 1513 Indicates No Intent to Preempt Generally Applicable Business Taxes.

The United States finds no "contradiction, ambiguity, or 'paradox' in the statutory scheme," U.S. Br. at 13, and by its listing of designated states argues that the statutory language inevitably leads to the conclusion that any and all taxes measured by gross receipts applied to airlines are preempted by that language.[25]

Section 1513(a) prohibits state taxes "on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts therefrom * * * *" This language indicates a much narrower scope of preemption for at least three reasons: First, subsection (a) itself indicates that only airline specific taxes were to be preempted; second, there exist inherent

[25]The United States ignores the distinction between taxes *on* gross receipts and taxes *measured by* gross receipts. U.S. Br. at 11.

conflicts between subsection (a) on the one hand and subsections (b) and (c) on the other which indicate a limited scope of subsection (a); and third, there is an unwarranted assumption on the part of the United States, the ATA, and the airlines that the term "on the gross receipts therefrom" in subsection (a) indicates an intent to preempt taxes *measured by* gross receipts.

### (a) Subsection (a) Indicates That Only Airline User Taxes Were Preempted.

The United States, the ATA, and the airlines read subsection (a) as preempting any state tax on *or measured by* gross receipts which includes in its universe of subjects airlines or users of airlines. The plain language indicates otherwise. The language is directed at taxes specifically on airline users: persons, the carriage of persons, and air transportation. Taxes of general applicability on businesses, including airlines, are not addressed. At the very least the language is ambiguous.

### (b) Subsection (a) Conflicts with the Other Subsections of § 1513.

Subsection (a), *supra*, must be read with subsection (b), which states in relevant part:

> Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) * * * including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * * *

The United States, the ATA, and the airlines contend that this subsection does not limit the scope of subsection (a) because of the "other than those enumerated" language. Therefore, they argue, if a tax is enumerated in subsection (a), it is preempted despite any language in subsection (b) to the contrary.[26] This argument flies in the face of commonly accepted canons of statutory construction[27] and defies common sense.

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[26] U.S. Br. at 13, 15; ATA Br. at 5; Hawaiian Br. at 12-13; Aloha Br. at 12.

[27] *See, e.g., Pennhurst State School and Hospital v. Halderman,*

Subsection (b) states that included in the taxes "other than those enumerated in subsection (a)" are a number of types of generally applicable state business taxes: property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. The subsection (b) enumeration is illustrative of types of taxes not included in the subsection (a) enumeration, which itself is inclusive of the kind of taxes for which coverage was intended. In other words, for example, a franchise tax is "included" in the types of taxes not enumerated in subsection (a). Therefore, such a tax, no matter how measured, is permitted under the plain language of § 1513.

Two comparisons of subsections (a) and (b) indicate that the meaning of § 1513 at least is ambiguous.

First, subsection (b) permits sales tax on the sale of goods or services. Subsection (a) purports to prohibit a tax on the sale of air transportation. This is inherently contradictory in that a sales tax on air transportation is a sales tax on a service. Perhaps one can create a distinction which arguably could have been contemplated by Congress, but we can find none in the legislative history.[28]

Second, subsection (b) allows franchise taxes or property taxes. As pointed out by the Hawaii Supreme Court and by this Court on numerous occasions, a tax may be a franchise tax or a property tax even if measured by gross receipts.[29] Thus, the response by the airlines that subsection (a) controls over subsection (b) in all respects flies in the face of another comparison and its history.

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451 U.S. 1, 18 (1981) (Court must not be guided by single sentence but to "the provisions of the whole law, and to its object and policy").

[28]This contradiction is made even more glaring considering the source of the language in subsection (b) purporting to prohibit taxes on the sale of air transportation. As introduced S. 3755 contained no such prohibition. Instead, to the language later incorporated in subsection (b) preserving "sales or use taxes on the sales of goods or services" there was added: "(other than on the sale of interstate air transportation or any portion thereof)." The shift of this language from the savings provision to subsection (a) points out not only the necessity to read the two subsections together, in that they cover some of the same taxes, but S. 3755, as reported, preempted less than S. 3755 as introduced. For example, the "any portion thereof" language was deleted, indicating that sales of intrastate transportation were not affected.

[29]See note 32, *infra*.

Subsection (b) exempts from the subsection (a) preemption "rental charges, landing fees, and other service charges * * * *" This language was added in (b) because industry representatives, including the ATA, recognized that such charges would fall within the prohibition of subsection (a).[30]

Accordingly, subsection (a) does not control over subsection (b); they must be read together to resolve any ambiguities inherent in them.[31]

### (c) A Preemption of a Tax "on Gross Receipts" Does Not Preempt a Tax Measured by Gross Receipts.

The plain language of subsection (a) indicates that, at most, taxes *on* gross receipts are preempted.

The United States, the ATA, and the airlines argue that subsection (a) preempts four *types* of taxes: taxes (1) on persons, (2) on the carriage of persons, (3) on the sale of air transportation, or (4) on gross receipts derived therefrom. This argument is flawed. The first three types

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[30] *See, e.g., 1972 House Hearings* at 100.

[31] A comparison of subsection (a) and (c) also is useful. Subsection (a) allows an exemption from its preemptive sweep for an airport operating authority which is collecting a head tax on passengers and is engaged in paying off loans for airport improvements through the proceeds of that tax. The exemption is not just for head taxes, which may be levied by such authority, but for the entire subsection (a). If, as the United States, the ATA, and the airlines suggest, subsection (a) was intended to preempt all kinds of generally applicable business taxes, subsection (c) is quite confusing. Consider the following example.

A municipality levies a head tax in 1971 to pay off some debts for airport improvements. The state imposes a general business tax measured by gross receipts in 1971 also. Accordingly, under subsection (c), subsection (a) is not effective until December 31, 1973. Does that mean that state's tax, designated for preemption by the United States is applicable prior to December 31, 1973? Does it mean that such general business tax, measured by gross receipts, is inapplicable only for those receipts involved in transportation to or from the municipality with the grandfathered head tax, but not those receipts involved in transportation between other cities?

Subsection (c) can be read consistently with subsection (a) only if subsection (a) has a limited effect, i.e., it applies only to head taxes and other user taxes. A broader reading of subsection (a) renders subsection (c) confusing. Because the Court must give effect to all parts of the statute, the plain meaning of subsection (a) must be limited, and the contention of the United States, the ATA, and the airlines rejected.

of taxes define the incidence of the tax: *on* persons, *on* the carriage of persons, or *on* the sale of air transportation. The fourth type of tax does not define an incidence, but a measure: gross receipts. This is inconsistent with the longstanding distinction of this Court, known to Congress, between a tax the incidence of which is *on* gross receipts and a tax *measured by* gross receipts.[32] It also is inconsistent with the common canon of statutory construction *noscitur a sociis*: the meaning of one term must be defined in accordance with the terms around it.[33] Accordingly, because the first three types of taxes are defined by their incidence, the fourth type must also define an incidence, unless the language specifically indicates otherwise. Rather than prohibit taxes measured by gross receipts, subsection (a), at most, preempts taxes levied directly *on* gross receipts from the various business activities described.[34]

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[32]*See, e.g., Railway Express Agency, Inc. v. Virginia*, 358 U.S. 434, 441 (1959); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256-57 (1938); *Pullman Co. v. Richardson*, 261 U.S. 330, 338-39 (1923).

[33]In *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), this court stated: "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."

[34]"There is another plain language argument indicating a limited scope of preemptive intent. This was made to the Arizona Court of Appeals and accepted there by the dissent. *State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596, 602 (Ariz. App. 1980).

The term "or on the gross receipts derived therefrom" relates only to the last antecedent: the sale of "air transportation." *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972). Accordingly a tax on gross receipts (or even measured by gross receipts) would be preempted only if it is on the sale of "air transportation." "Air transportation" is defined to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." 49 U.S.C. §1301(10). Those terms in relevant part mean carriage of persons or property between

> a place in any State * * * and a place in any other State * * *; or between places in the same State of United States through the air space over any place outside thereof; * * * *

Though in the instant case before the Court, this definitional test may be met, in many of the *amicus* and other designated states, such as Arizona and Washington, it is not. That is because those states impose their taxes only on intrastate business. Interstate business is exempted by state law or administrative practice.

### 2. Even If There Is No Ambiguity on the Face of § 1513, This Court Should Examine its Legislative History.

The United States, the ATA, and the airlines seek to have this Court ignore the legislative history of § 1513 under a "plain meaning" argument. The time is long past when hundreds of pages of legislative history can be ignored in determining even the plain meaning of a few words of a statute, particularly when the result would be a substantial change in existing law. *See, e.g., Muniz v. Hoffman*, 422 U.S. 454, 469-70 (1975).[35]

Indeed, if this statute is so "plain" in its meaning, why did it take the airlines so long to raise the contentions they now make in a number of states? In many of the states with taxes measured by gross receipts, the airlines continued to pay its taxes long after the 1973 Act.

We turn now to legislative history of § 1513.

## C. The Legislative History of § 1513 Indicates That Congress Did Not Intend to Preempt Non-Discriminatory, Generally Applicable Business Taxes.

### 1. The Legislative History Indicates That Congress Intended to Preempt User Taxes.

The Airport and Airway Development Act of 1970, 84

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Accordingly, the preemptive language does not apply. So, even if subsection (a) attempts to prohibit a tax measured by gross receipts, it does not prohibit some states' taxes in that they are imposed only on airlines in intrastate commerce. See also note 28 for evidence that preemption of state taxes on intrastate transportation was not intended.

We raise this issue not so much to find an easy escape for some of the states, but because it indicates the limited nature of the Congressional intent to preempt state laws.

[35]Indeed, to state that §1513(a) has a plain meaning "ignores reality." *See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L.Rev. 195, 199 (1983). *See also Federal Bureau of Investigation v. Abramson*, 102 S.Ct. 2054, 2061 n. 7 (1982), which states: " 'The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification,' " *quoting United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

Stat. 219, and the companion Airport and Airway Revenue Act of 1970, 84 Stat. 236, were enacted to increase funding for the nation's airports and airways. These two statutes represent culmination of many years of Congressional and executive branch studies and proposals for user taxes to improve the airports and airways.[36]

The 1970 Act imposed several types of user taxes to finance an Airport and Airway Development Trust Fund to finance the federal share of such development. These taxes included a passenger ticket tax, a tax on the transportation of property, a fuel tax and a "head tax" on international departures. *See generally Massachusetts v. United States*, 435 U.S. 444 (1978). Though possible adverse impacts of head taxes were presented to Congress,[37] Congress took no action in 1970 to preempt them. Indeed, under one proposal before the Congress such local "user charges" were to be encouraged as a matter of federal policy.[38]

In 1972, one particular form of user tax—the "head tax"—became particularly controversial. This Court in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707 (1972), upheld the constitutionality of head taxes levied by the Evansville-Vanderburgh Airport Authority in Indiana and by the State of New Hampshire. With that decision such taxes proliferated causing some member of Congress and airlines officials to fear disruption of the airline system.[39]

In 1972, federal legislation was introduced to prohibit

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[36] *See, e.g., Hearings on Administration's Proposals on Airway User Charges, Before the House Comm. on Ways and Means*, 89th Cong., 2d sess. (1966); *Hearings on Administration's Proposal on Aviation User Charges Before the House Comm. on Ways and Means*, 91st Cong., 1st sess. (1969), *Hearings on the Airport & Airway Development Act of 1968 Before the Aviation Subcomm. of the Senate Commerce Committee*, 90th Cong., 2d sess. (1968).

[37] *See Hearings on Administration's Proposal on Aviation User Charges before the House Comm. on Ways and Means*, 214, 91st Cong., 1st sess. (1969) (testimony of representative of the ATA).

[38] *See Hearings on Aviation Facilities Maintenance and Development, Pt. 1, before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st sess. 138-39 (1969).

[39] *See, e.g., 1973 House Hearings* at 64-65, 67, 97-99, 101-02.

user taxes, such as the head tax, which had been imposed by the United States in the 1970 Act.[40]

The legislative history indicates clearly the relationship between the state taxes intended to be prohibited and the federal taxes which were imposed on various users of airways and airports in the 1970 Act. Perhaps the most succinct statement of purpose in the 1973 House Report, at 3:

> H.R. 6388 prohibits the so-called "head tax" by any government agency other than the United States, on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate by the Federal Government, and *will not be subject to the various user taxes* being levied in a number of jurisdictions across the country. (Emphasis added.)[41]

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[40] *E.g.*, S. 3611, 92d Cong., 2d sess., H.R. 14897, H.R. 14991, 92d Cong. 2d sess.

The airlines and the ATA cite a 1971 bill, H.R. 2337, 92d Cong., 1st sess. (1971), introduced by Representative Moss, which would have prohibited states from levying a tax "on the carriage of persons in air transportation." ATA Br. at 6-7; Hawaiian Br. at 18; Aloha Br. at 19. In litigation in other states, the Moss bill has been cited for the proposition that § 1513 was not intended to be limited to preempt head taxes. Despite the problems of imputing a 1973 intent of the entire Congress from a 1971 bill introduced by one Representative, we do not disagree with that conclusion. The Moss bill, like all the bills introduced prior to the 1972 Hearings indicated, by their plain language an intent to preempt state taxes on users of airlines. These go beyond head taxes, though head taxes were considered to be the most disruptive form of duplicative user taxes.

[41] The 1972 Senate Report at 5 states:

> [S. 3755] prohibits the levying, by State and local governments, of passenger "head" taxes or use taxes on the carriage of persons in air transportation. * * *
>
> * * * *
>
> The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

The Senate Committee continued, at page 20:

> The provision is in response to a situation which has been brought about by an April 19, 1972, Supreme Court decision in *Evansville-*

One of the prime sponsors in the Senate, Senator Cannon, repeated this relationship between the federal user taxes imposed and the state and local user taxes prohibited. Indeed, he viewed the enactment of § 1513 as accomplishing what the 1970 Act was intended to do: preempt state and local user taxes of the same sort as the federal taxes. In 1973, Senator Cannon stated:

> Finally, Mr. President, the committee bill prohibits State and local taxation of air fares. The Congress intended in 1970 to preempt the States and localities from levying such taxes, as taxation on air fares is one of the predominant sources of revenue for the trust fund. Recent Supreme Court decisions necessitate the clarification of this congressional policy determination.

119 Cong. Rec. 3350 (Feb. 5, 1973).[42]

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*Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

This legislative intent is echoed in the 1973 Senate Report at 4, 6 (describing the issue as one of "state and local 'head' taxes or user fees on passengers in air transportation"), 12, 17 (response to *Evansville*), 25-26 (describing link between federal system of taxes and prohibition of state user taxes). *See also* 1973 House Report at 4-5 (response to head tax proliferation).

[42]Other floor debates in the Senate support this position. *E.g.*, 118 Cong. Rec. 17468 (May 16, 1972) (remarks of Sen. Cannon on introduction of S. 3611) ("the High Court has opened the door wide to multiple passenger taxation"); *id.* 22599 (June 27, 1972) (remarks of Sen. Cannon on introduction of S. 3755) ("it was our firm intent that the Federal excise tax be the only tax on passengers in air transportation"); *id.* 27814 (Aug. 10, 1972) (remarks of Sen. Cannon) ([head] taxes "inimical to the development of a national system funded in large part by uniform Federal taxes"); 119 Cong. Rec. 214-15 (Jan. 4, 1973) (remarks of Sen. Cannon on introduction of S. 38).

In the House, the debates were to the same effect. For example, Representative Bingham stated:

> [T]his legislation endorses and perpetuates user taxes in the aviation field by the Federal Government but prohibits them as a revenue device for State and local governments.

*Id.* 13903 (May 2, 1973). *See also id.* 13899 (remarks of Rep. Kuykendall).

Indeed, the ATA in its brief admits that § 1513 was enacted "in order to prohibit the States from imposing taxes on the same air carrier receipts on which the Federal taxes were based." ATA Br. at 4.[43]

### 2. To the Extent § 1513 Preempts State or Local Taxes Other Than User Taxes, It Preempts Only Discriminatory Taxes, Such as Ohio's, Not Business Taxes of General Applicability.

Although the legislative history indicates that the primary purpose of § 1513 was to preempt state and local head taxes or other user taxes of the type imposed by the federal government in 1970, there is some language in § 1513 which could be construed to expand beyond the scope of the 1970 federal user taxes.

In 1972, the Senate held hearings on S. 3611 which simply prohibited state taxes "on the carriage of persons in air transportation." After the hearings, Senators Cannon and Magnuson introduced S. 3755, with the following prohibitory language:

> No State * * * shall levy or collect a tax * * * on persons traveling in air transportation or on the carriage of persons in air transportation or on the gross receipts therefrom.

The source of this language, added to S. 3611, prohibiting state taxes "on the gross receipts derived therefrom" is not clear. The United States, the ATA, and the airlines speculate that it was added in response to a brief statement in the testimony of Whitney Gillilland, Vice-Chairman of the Civil Aeronautics Board in the 1972 Senate Hearings. In that testimony, he made passing reference to an Ohio excise tax imposed only on airlines,

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Statements by the prime sponsors in the committee hearings also support the proposition that the prohibition in §1513 was in response to *Evansville* and was designed to prohibit state and local user taxes. *See e.g., 1972 Senate Hearings at 129* (remarks of Sen. Cannon).

[43]This is consistent with testimony of the ATA before Congress. *See* 1972 Senate Hearings at 168-169, 172; *1972 House Hearings* at 76; *1973 House Hearings* at 96-98.

which is measured by gross receipts. The entirety of his testimony on the Ohio tax is as follows:

> In some cases, the increased taxes on airlines are not going to airport development at all. The Supreme Court is being asked to review an Ohio tax on the gross receipts of airline business done in Ohio. The revenue from this source is earmarked under Ohio law to pay the deficit in the policeman's and fireman's disability and pension fund.

*1972 Senate Hearings*, at 137.

Assuming that the gross receipts language was inserted as a result of this brief oral testimony to four Sentors,[44] it is a quantum leap to impute to the whole Senate, and the House,[45] an intent to preempt all generally applicable business taxes measured by gross receipts. That such a broad result was not intended by Congress is supported by legislative history much more specific than that short paragraph.

Perhaps the most revealing indication of this is Senator Cannon's response to a 1972 amendment proposed on the Senate floor by Senator Cotton of New Hampshire. Because New Hampshire was the only state with a head tax, Senator Cotton sought to have that tax "grandfathered" for a short period of time in order to give the State time to find an alternative source of revenue. Accordingly, he proposed the following amendment to S. 3755 after the prohibitory language in subsection (a):

> *Provided however*, That any State * * * which levied and collected a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until July 1, 1973.

118 Cong. Rec. 27816 (Aug. 10, 1972).

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[44] *See 1972 Senate Hearings* at 129 (those present were Senators Cannon, Spong, Pearson and Stevens).

[45] Mr. Gillilland also mentioned briefly the Ohio tax in his testimony in the *1972 House Hearings* at 52. However, the House did not adopt any "gross receipts" language in 1972. The reported bill

This grandfather clause simply repeated the prohibitory language. Thus, whatever state taxes were preempted by subsection (a) were to be grandfathered by this amendment if such taxes were in effect prior to May 21, 1970. Under the position of the United States, the ATA, and the airlines, this would grandfather the taxes of Arizona, Alaska, Washington, West Virginia, New York, and all the other designated states, except Delaware, as well as Ohio's discriminatory excise tax. However, Senator Cannon did not so describe the amendment and, therefore, did not comprehend the scope of the preemptive language to include the taxes of those states. He supported the Cotton amendment, stating: "The amendment applies only to the State of New Hampshire; it is the only State that had a head tax being levied and collected at the time of the adoption of the Airport and Airway Development Act." *Id.* at 27817.[46]

Had the "gross receipts" language been intended to preempt the large number of state taxes of general applicability in effect in 1970, Senator Cannon likely would not have given such a narrow reading to the Cotton amendment. The narrow reading given it by the manager of the bill in the Senate indicates that the preemptive language (like the grandfather language) was not intended to have the broad preemptive effect argued by the United States, the ATA, and the airlines.

The other major amendment adopted by the Senate also supports the narrow reading of subsection (a). Senator Chiles of Florida sought an amendment which would allow a head tax preempted under subsection (a) to remain in effect if that tax was used to repay obligations for airport improvements.[47] A version of the amendment now is

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called for an 18 month moratorium on state and local taxes "on persons traveling in interstate, overseas, or foreign air transportation or on the carriage of persons in interstate, overseas, or foreign air transportation." 1972 House Report at 1.

[46]In the House, this amendment was referred to as "tailored to the specific situations * * * *" 119 Cong. Rec. 13899 (May 2, 1973) (remarks of Rep. Kuykendall). *See also id.* 13905 (remarks of Rep. Adams); *id.* 17344-45 (May 30, 1973) (remarks of Rep. Staggers).

[47]*See* 118 Cong. Rec. 27818-20 (Aug. 10, 1972).

codified as subsection (c) to § 1513. Under these conditions, the head tax would not just be saved, but the entire subsection (a) would be ineffective. If subsection (a) were to have a broad preemptive effect on taxes of general applicability, this amendment would lead to incongruous results. For example, if there was an airport in a state levying a head tax which met the Chiles amendment conditions, would the whole state taxing scheme otherwise preempted now be grandfathered?[48] Or, would just the head tax be saved? If the latter, why was the amendment not so drafted?

The reality is that the Senate and the House in 1972 did not give any broad effect to the gross receipts language which was added by the Senate Committee. In fact, in the 1972 debate, there was no mention of the gross receipts provision. Head taxes and "discriminatory" taxes were the concern of the members.[49] The scope of § 1513 must be construed according to the "evil which Congress sought to correct and prevent." *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1951). As of 1972, this "evil" was the head tax and other user taxes.

Though in 1973 there were isolated remarks about gross receipts taxes in floor debate, those too were in the context of discriminatory taxation.[50] Increased attention

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[48] *See also* note 31, *supra*.

[49] For example, in describing the Conference Report, Senator Cannon stated:

> [T]he conference report represents an excellent piece of legislation and is a great step forward in providing more Federal assistance in developing the Nation's air transportation system without burdening passengers with locally imposed discriminatory taxation.

118 Cong. Rec. 35862 (Oct. 13, 1972).

*See, e.g.*, 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon); *id.* 27815 (Aug. 10, 1972); *id.* 27816 (remarks of Sen. Cotton); *id.* 27826-27 (remarks of Sen. Hartke); *id.* 27828 (remarks of Sen. Spong); *id.* 29153 (Aug. 15, 1972) (remarks of Rep. Staggers).

[50] For example, in describing the conference report, Senator Cannon stated:

> Finally, our bill prohibits discriminatory State and local taxation on airline passengers and on the gross receipts derived from air transportation.

119 Cong. Rec. 18045 (June 5, 1973).

*See id.* 3348-49 (Feb. 5, 1973) (remarks of Sen. Cannon); *see also*

in the 1973 debate may be the result of increased discussion in the 1973 House Hearings of the discriminatory Ohio tax. At these hearings, the deputy tax commissioner of Ohio described the tax in more detail.[51] Officials of the ATA also testified about the problems with such a tax.[52] However, they were very clear that there was only one tax like it in the entire country and that the tax was bad not because it was imposed on airlines, but because it was imposed only on airlines, and not on other businesses. The Ohio Supreme Court agreed with this construction of the singular focus of the tax.[53] The ATA apparently had no objection to generally applicable business taxes. It only objected to additional, "discriminatory," and "special" burdens imposed on airlines.[54] Indeed, in its brief, the ATA states: "It seems

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*id.* 3350 (remarks of Sen. Cannon); *id.* 3352 (remarks of Sen. Pearson); *id.* 3928 (Feb. 8, 1973) (remarks of Rep. Adams in introducing legislation); *id.* 13898 (May 2, 1973) (remarks of Rep. Staggers); *id.* 13899 (remarks of Rep. Kuykendall); *id.* 13900 (remarks of Rep. Jarman); *id.* 13903 (remarks of Rep. Bingham); *id.* 13905 (remarks of Rep. Adams).

[51] *1973 House Hearings* at 246-53 (testimony of Theodore Koetz). Mr. Koetz stated, at 246: "Mr. Chairman, basically we have an airlines excise tax in Ohio which is unique, and we are probably the only State in the 50 States that has such a tax."

[52] *1973 House Hearings* at 96-101, 103-107 (testimony of Stuart Tipton). Mr. Tipton urged the Subcommittee "to again act to prevent the levying of discriminatory State or local taxes on travelers and air commerce, while providing for necessary improvements to the Nation's airport system." *Id.* at 97.

[53] *See United Airlines, Inc. v. Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), *appeal dismissed*, 407 U.S. 917 (1972). The Ohio court upheld the tax from a commerce clause attack stating: "the fact that the Ohio airlines excise tax is in addition to other taxes that appellant incurs in Ohio does not for that reason render it constitutionally fatal." 276 N.E.2d at 637. The other taxes United paid in Ohio included Ohio's franchise tax. *Id.* at 635.

[54] Mr. Tipton testified as follows regarding the Ohio tax:

> We urge you to take action now, to prohibit this kind of direct and indirect *discriminatory taxation* of air travelers and air commerce.
>
> *Particularly* dangerous, burdensome, and *discriminatory* in our judgment *is one State's imposition of a tax on the gross receipts derived from the sale of interstate air transportation*—a so-called airlines excise tax. This tax is levied at a rate of 4 percent on airline receipts in that State "for the privilege of engaging in the

clear that the new language prohibiting taxes on gross receipts was included for the *specific purpose* of barring taxes like the Ohio gross receipts tax." ATA Br. at 8 (emphasis added). We agree that the language in question has no preemptive effect beyond that "specific purpose."[55]

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business of transporting persons or property by air." The revenue derived from this tax is used for projects totally unrelated to aviation. Furthermore, it is levied only on airlines. *Airlines pay all other taxes generally applicable to business in the State, and yet they and their passengers are being singled out as an easy source of revenue,* whether or not airline operations in the State are profitable, and regardless of their general tax burden. *Thus, Pandora's box has been opened to another form of discriminatory taxation* on air transportation which, if allowed to proliferate in a myriad of possible forms, could deal a severe financial blow to air travelers as well as the airlines.

* * * *

* * * *The airlines pay all the taxes that other business enterprises pay in the State of Ohio.* We are taxed in the same fashion as others. *This gross receipts tax is an additional and very special burden imposed by Ohio.*

*1973 House Hearings* at 98-99 (emphasis added).

[55]This discovery of a broad preemptive intent is new and startling. Since the enactment of § 1513, the airlines not only have paid general business taxes measured by gross receipts to the designated states, but they have characterized § 1513 as a "ban on head taxes." *See Airport and Airway Improvement Act of 1981 Hearings on H.R. 2643, Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 97th Cong., 1st sess., 546 (1981). H.R. 2643 would have defederalized the airport aid program by defining ineligible airports while rendering ineffective the preemptive language of § 1513(a) "with respect to the operation of an airport * * * during any period in which such airport is made ineligible by law to receive a grant * * * under this Act." *See id.* at LXXIV. If § 1513 was intended to have a broad preemptive effect on state taxes of general applicability, then this provision could lead to an incongruous result. Would a state's general tax still be preempted if one of its airports no longer was eligible? What if all the airports no longer were eligible? Again, this bill and the description of it by ATA as remaining a ban on head taxes indicates the general understanding of the Congress and the airlines industry that § 1513 should not be given broad preemptive effect.

Post 1973 statements and actions of the prime sponsors of the § 1513 were to the same effect. *See id.* at 158-59 (remarks of Sen. Cannon). Though not entitled to great weight, post enactment statements are relevant when made by "important figures" in the enactment of the original legislation. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 51 U.S.L.W. 4449, 4454 n. 23 (April 20, 1983).

In sum, there is no basis in the legislative history for the proposition that the brief allusion to the Ohio tax in the testimony of Mr. Gillilland and the insertion of the "gross receipts" language transforms § 1513 into a broad prohibition of taxes of general applicability which are measured by gross receipts. The evil sought to be eliminated by Congress was state user taxes, including head taxes, not the broad non-discriminatory taxes historically imposed by Hawaii and the designated states. If Congress wishes to preempt these taxes it must do so expressly, like it has done in other contexts. Here, there is no such manifestation of intent.

## CONCLUSION

In issue are the general business taxes of eleven states as applied to airlines. The airlines and their association would have the Court overturn that application of those taxes by oversimplified construction of the federal statute, allegedly preemptive, and by selective recourse to legislative history which fails to support the broad reach appellants attribute to the statute.

This Court has consistently struck the sensitive federal-state balance where the state taxing power is at risk. In the current term, the Court has refused, even where the interests of the federal government itself were concerned, to find interference with a federal function from a tax non-discriminatory in its practical application. *Washington v. U.S.*, 103 S.Ct. 1344 (1983). Yet it has found other forms of taxation constitutionally infirm where a business or activity is singled out for special treatment. *Minneapolis Star v. Minnesota Comm'r of Rev.*, 103 S.Ct. 1365 (1983). The federal statute at issue does no more than to invalidate this type of discriminatory tax together with those other taxes which are not the concern of the *amici* states here.

The Court, as it has on prior occasions, may properly require more from the statute and its underlying history than is shown here before precluding the operation of these state taxes of general application. The decision of the Supreme Court of Hawaii should be affirmed.

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# APPENDIX

## FEDERAL STATUTES

**49 U.S.C. § 1513.**

(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or in the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possession of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or

possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans, the provisions of subsection (a) of this section shall not apply to such authority until December 31, 1973.

**49 U.S.C. § 1301.**

As used in this chapter, unless the context otherwise requires—

* * *

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

* * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * *

(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for

compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * *

(23) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbo-jet powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

## STATE STATUTES

### Alaska Statutes (1978)

**Sec. 43.70.020. Application for license.** (a) For the privilege of engaging in a business in the state, a person shall first apply, upon forms prescribed by the commissioner, and obtain a license so to do, and pay the license fee provided for in § 30 of this chapter. A license issued to a firm for a particular line of business covers all its operation in the state in the lines of business regardless of the number of its establishments. * * *

**Sec. 43.70.030. Levy and computation of license fee.** (a) The license fee for each business is $25 plus a sum equal to one-half of one per cent of the gross receipts in excess of $20,000 from the business during the year for which the license is issued, except that all gross volume in excess of $10,000 a year is taxed at the rate of one-quarter of one per cent. * * *

**Sec. 43.70.110. Definitions.** In this chapter, unless the context otherwise requires, the following words have the meanings indicated.

(1) "Business" includes all activities or acts, personal, professional or corporate, engaged in or caused to be engaged in, or following or engaging in a trade, profession, or business, including receipts from advertising services, rental of personal or real property, construction, processing, or manufacturing, but excluding fisheries

businesses, fishermen, liquor licenses, insurance businesses, mining, and coin-operated amusement and gaming machines, calling or vocation, with the object of financial or pecuniary gain, profit or benefit, either direct or indirect, and not exempting subactivities producing marketable commodities or services used or consumed in the main business activity, each of which subactivities shall be considered business. The giving or supplying of services as an employee and the furnishing of property, services, substances, or other things, by a person who does not hold himself out as regularly engaging in those transactions, does not constitute business under the meaning of this chapter.

**Arizona Revised Statutes**

**§ 42-1309**

**A.** There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310, 42-1310.02, 42-1311, 42-1312, 42-1312.01 and 42-1313 through 42-1315.

**§ 42-1310**

**The tax imposed by § 42-1309, subsection A shall be levied and collected at the following rates:**

* * *

**2. At an amount equal to one per cent of the gross**

proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

* * *

(d) Transporting for hire freight or passengers by railroads or aircraft from one point to another point in the state.

**Delaware Code**

**Title 30, § 2301**

(b) Upon every person engaging or continuing to engage in any service industry, business, calling or profession not otherwise specifically licensed and taxed under subsection (a) of this section, there is hereby levied and there shall be collected an annual general service license fee of $50.

* * *

(d) (1) In addition to the license fee required by subsections (a) and (b) of this section, every person shall pay an annual license fee payable in quarterly installments on or before the twentieth day of each of the months of April, July, October and January of each year at the rate of 4/10 of 1 percent of the aggregate gross receipts paid to such person during the last preceding 3-month period ending on the last date of the months of March, June, September and December. The quarterly returns shall be accompanied by a certified statement on such forms as the Department of Finance shall require in computing this fee due.

(2) Notwithstanding paragraph (1) of this subsection, if the aggregate gross receipts prescribed by paragraph (1) for any calendar quarter does not exceed $6,000, the return and payment of the additional license fee imposed for such quarter shall be filed on or before the 20th day of the 1st month following the close of the 1st subsequent calendar quarter in which the aggregate gross receipts for such quarter exceeds $6,000, or, if that does not occur, on the

20th day of the 1st month following the close of the 4th calendar quarter of the calendar year.

**Indiana Code**

**§ 6-2.1-2-2. Imposition of gross income tax.** — (a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) The entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) The taxable gross income derived from activities or businesses or any other source within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

(b) The receipt of taxable gross income is subject to the applicable rate of tax fixed under section 3[6-2.1-2-3] of this chapter. The rate of tax is determined by the type of transaction from which the taxable gross income is received.

**§ 6-2.1-2-3. Tax rates.** * * *

(b) The receipt of gross income from transactions described in section 5 [6-2.1-2-5] of this chapter is subject to the following rates of tax:

| Calendar Year | Rate of Tax |
|---|---|
| 1976 | 1.60% |
| 1977 | 1.55% |
| 1978 | 1.50% |
| 1979 | 1.45% |
| 1980 | 1.40% |
| 1981 | 1.35% |
| 1982 | 1.30% |
| 1983 | 1.25% |
| 1984 | 1.20% |
| 1985 | 1.15% |
| 1986 | 1.10% |
| 1987 | 1.05% |
| 1988 | 1.0 % |
| 1989 | .95% |
| 1990 | .90% |

For each calendar year following 1990, the rate of tax shall reduce five hundredths of one percent [.05%] from the rate for the preceding calendar year, and after December 31, 2007, no tax shall be imposed under this chapter.

**§ 6-2.1-2-5. Classifications under 6-2.1-2-3(b).** — The receipt of gross income from the following is subject to the rate of taxation prescribed in section 3(b) [6-2.1-2-3(b)] of this chapter:

* * *

(3) Operating a steam or electric railway, streetcar line, motor vehicle, steam or motorboat, or any other vehicle for the transportation of freight, express, or passengers for hire; * * *

**Maryland Code**

**Title 81, § 130. Imposition of tax.**

(a) *Generally.* — A state franchise tax is levied annually measured by the gross receipts for the preceding calendar year of the following classes of foreign or domestic companies doing business in this State, at the following percentage rates of gross receipts:

(1) Telegraph, cable, express, transportation, (excluding railroad), parlor car, or sleeping car companies, at 2½ percent.

**Mississipi Code**

**§ 27-65-13. Tax levied.**

**There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.**

**§ 27-65-19. Public utilities.**

* * *

(2) Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this state, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business, except persons operating local transit busses shall be exempt from such tax; and upon persons operating taxicabs within municipalities and within four miles thereof, there shall be collected a tax equal to two per cent of the gross income of the business.

**New York Code**

**§ 184.** Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, [shall pay] for the privilege of exercising its corporate franchise, or [carrying on its] *of doing* business, *or of employing capital, or of owning or leasing property in this state* in [such] *a* corporate or organized capacity [in this state, an excise], *or maintaining an office in this state, shall pay a franchise* tax [or license fee] which shall be equal to three-quarters of one per centum upon its gross earnings from all sources

within this state [, excluding earnings derived from business of an interstate character. Provided, however, gross earnings from transportation or transmission business both originating and terminating within this state and traversing both this state and another state or states or country shall be subject to the excise tax or license fee imposed by this section and such earnings shall be allocated to this state in the same ratio that the mileage within the state bears to the total mileage of such business. A corporation which has made an election under paragraph three of section seven hundred nine of this chapter shall include as part of its gross earnings under this section, without the exclusion provided herein, the gross earnings required to be included under the provisions of such paragraph.]

**Oklahoma Statutes**

**Title 68, § 1354. Tax Levy—Rate—Sales Subject to Tax**

There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of two percent (2%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

(B) Natural or artificial gas, electricity, ice, steam or any other utility or public service, except water and those specifically exempt under Section 1357 of this Code;

(C) Transportation for hire to persons by common carriers, including railroads, both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines and other means of transportation for hire;

**Revised Code of Washington**

**82.16.010 Definitions.** For the purposes of this chapter, unless otherwise required by context:

* * *

(11) "Public service business" means any of the businesses defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), and (10) or any business subject to control by the state, or having the powers of eminent domain and the duties incident thereto, or any business hereafter declared by the legislature to be of a public service nature. It includes, among others, without limiting the scope hereof: Airplane transportation, boom, dock, ferry, log patrol, pipe line, warehouse, toll bridge, toll logging road, water transportation and wharf business.

**82.16.020 Public utility tax imposed.** There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(1) Railroad, express, railroad car, water distribution, light and power, telephone and telegraph businesses: Three and six-tenths percent;

(2) Gas distribution business: Three percent;

(3) Urban transportation business: Six-tenths of one percent;

(4) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(5) Motor transportation and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent.

**West Virginia Code**

**Article 12A, § 11-12A-2.**

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business

in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates as follows: Motor vehicle carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three and seventy-four one-hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one-hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income: Provided, however, that a motor vehicle carrier which transports goods within the State of West Virginia and which received those goods as a connecting carrier in an uninterrupted continuation of interstate transportation done under the authority of a certificate of convenience and necessity issued by the interstate commerce commission, shall be taxed pursuant to subdivision (a) of section three [§ 11-12A-3] of this article. This provision shall apply only to the transportation of goods carried within the State without a container change or warehousing.